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FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

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Feb 03, 2016

SEAN F. MCAVOY, CLERK

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

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JASON SHIRTS,

Plaintiff,

v.

DR. BENNJAMIN RODRIGUEZ, DR.
NEAL RANDALMAN and P.A.C.
JOHNATHEN NEAU,

Defendants.

NO: 4:15-CV-05066-SMJ

ORDER DISMISSING SECOND
AMENDED COMPLAINT

BEFORE THE COURT is Plaintiff's Second Amended Complaint, ECF No.

13. Plaintiff, a prisoner at the Washington State Penitentiary, is proceeding *pro se*
and *in forma pauperis*; Defendants have not been served. Plaintiff seeks monetary
damages in excess of three million dollars and injunctive relief (i.e., a biopsy), for
the alleged failure to provide medical treatment.

As a general rule, an amended complaint supersedes the original complaint
and renders it without legal effect. *Lacey v. Maricopa County*, 693 F.3d 896, 927
(9th Cir. 2012). Therefore, “[a]ll causes of action alleged in an original complaint

ORDER DISMISSING SECOND AMENDED COMPLAINT -- 1

1 which are not alleged in an amended complaint are waived.” *King v. Atiyeh*, 814
2 F.2d 565, 567 (9th Cir. 1987) citing to *London v. Coopers & Lybrand*, 644 F.2d
3 811, 814 (9th Cir. 1981), overruled in part by *Lacey*, 693 F.3d at 928 (any claims
4 voluntarily dismissed are considered to be waived if not re-pled). After reviewing
5 the Second Amended Complaint in the light most favorable to Plaintiff, and for the
6 reasons set forth below, the Court finds that it fails to state a claim upon which
7 relief may be granted.

8 Plaintiff broadly asserts violations of his rights under the First, Fourth, Sixth,
9 Eighth and Fourteenth Amendments and offers the following conclusory assertion:
10 “Decency nobody should be left to suffer, and mental and physical anguish and
11 basicly [sic] left to die and still being abused and neglected do [sic] to the cost I’m
12 being denied treatment, and left in pain with no medes [sic] for pain assaulted
13 because the smell of my gas sores all over my body with no treatment.” In the
14 absence of any factual allegations supporting these assertions, Plaintiff has failed
15 to state a claim upon which relief may be granted. *See Bell Atl. Corp. v. Twombly*,
16 550 U.S. 544, 570 (2007) (a complaint must plead “enough facts to state a claim to
17 relief that is plausible on its face.”).

18 Plaintiff states that he was transferred to the Coyote Ridge Corrections
19 Center in August 2014. He states that he had a pre-existing diagnosis of Irritable
20 Bowel Syndrome, ECF No. 13 at 7, and was seen by Defendants Dr. Neal

1 Randalman and P.A.C. Johnathan Neau when he “went to medical.” He makes
2 no further allegations against Defendant Neau.

3 Plaintiff states that on August 15, 2014, Defendant Dr. Randalman informed
4 him that he would be tested for celiac sprue. Plaintiff complains that Defendant
5 Randalman expressed doubts that Plaintiff had celiac sprue. Nevertheless, the test
6 was conducted on approximately August 25, 2015,¹ and it came back “positive.”
7 Plaintiff indicates that he was subsequently placed on a gluten-free diet, although
8 he does not state when.

9 Plaintiff asserts that the named Defendants “ignored the possible
10 complication [of] celac/sprue [sic].” He fails, however, to support this blanket
11 assertion with any facts. He contends that “sprue” is a life threatening disease and
12 that a “biopsy” is “standard treatment” for celiac sprue. A biopsy, however, is a
13 diagnostic tool used to confirm the existence of celiac sprue. *See The Merck*
14 *Manual*, § 2 at 145 (18th ed. 2006). The treatment is a gluten-free diet. *Id.*

15 Plaintiff complains that on December 17, 2014, Defendant Dr. Randalman
16 withdrew a second request for a biopsy. He also complains that a gluten-free diet
17 provided no relief for his stomach cramps, diarrhea, bad gas and night sweats. He
18 states that he is in a small percentage of the population whose symptoms are not
19 alleviated by a gluten-free diet.

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¹ This appears to be a typographical error as the initial complaint was received prior to August 25, 2015.

1 Plaintiff asserts that on July 15, 2015, which was approximately a week after
2 he submitted his initial complaint in this action, Defendant Dr. Rodriguez removed
3 him from the gluten-free diet as his condition had continued to worsen. He claims
4 that six weeks after he was taken off the gluten-free diet, “the antibodies” were
5 elevated as anticipated. Plaintiff then complains that he received another “denial
6 from the Health Board Committee” on November 4, 2015. He contends that his
7 health has worsened over two years and his condition remains undiagnosed.

8 It has long been understood that medicine is not an exact science. *See*
9 *Owens v. White*, 380 F.2d 310, 316 (9th Cir. 1967). Differences in judgment
10 between an inmate and prison medical personnel regarding appropriate medical
11 diagnosis and treatment are not enough to establish a deliberate indifference claim.
12 *See Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989).

13 Here, Plaintiff admits that he received the treatment for celiac sprue, a
14 gluten-free diet, even in the absence of a confirming diagnostic test (i.e., a biopsy).
15 The fact that this dietary treatment was attempted and proved ineffectual is
16 insufficient to show an Eighth Amendment violation.

17 Plaintiff claims that he sought “pain management” several times. He does
18 not state when this occurred or any facts from which the Court could infer that
19 identified Defendants were deliberately indifferent to his suffering. According to
20 Plaintiff’s exhibits, when he sought “pain management” in November 2014, and

1 January 2015, he was instructed to sign up for sick call so that his pain could be
2 assessed. ECF No. 13 at 11-12. When he complained of sores in April 2015, he
3 was told that he would be seen if he was not already on the schedule within seven
4 days. ECF No. 13 at 13. When he sought pain relief for chronic pain in May 2015,
5 he was instructed to watch the “call out” for his scheduled appointment. ECF No.
6 13 at 14.

7 Ordinarily, exhibits should not be submitted with a complaint. Rather, the
8 relevant information contained in an exhibit should be paraphrased in the
9 complaint. A plaintiff should keep his exhibits to use to support or oppose a
10 motion for summary judgment or a motion to dismiss, or for use at trial.
11 Nevertheless, the Court has reviewed the exhibits and cannot infer from their
12 content that named Defendants were deliberately indifferent to Plaintiff’s serious
13 medical needs. In the absence of factual allegations to the contrary, these
14 documents suggest that Plaintiff was evaluated and treated regarding his pain
15 issues.

16 Plaintiff also attaches a Care Review Committee Report indicating that a
17 Neal J. Rendleman presented Plaintiff’s request for small bowel biopsies to
18 “monitor progress,” on December 17, 2014, but that the biopsy was determined not
19 to be medically necessary. ECF No. 13 at 15. Plaintiff has presented no facts
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1 showing that this was inconsistent with the recommendations of any of his treating
2 physicians.

3 In addition, Plaintiff has submitted documentation which appears to be
4 copies of pleadings submitted in another action before the Franklin County
5 Superior Court. ECF No. 13 at 16-26. These documents do not support a claim
6 that Defendants Randalman, Rodriguez or Neau knew of and disregarded an
7 excessive risk to Plaintiff's health in violation of the Eighth Amendment.

8 Although granted several opportunities to do so, Plaintiff has failed to
9 present a claim against identified Defendants upon which relief may be granted.

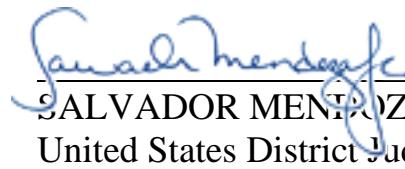
10 Accordingly, **IT IS HEREBY ORDERED:**

- 11 1. The Second Amended Complaint, **ECF No. 13**, is **DISMISSED with**
12 **prejudice** pursuant to 28 U.S.C. §§ 1915A(b)(1) and 1915(e)(2).
- 13 2. Pursuant to 28 U.S.C. § 1915(g), enacted April 26, 1996, a prisoner who
14 brings three or more civil actions or appeals which are dismissed as
15 frivolous or for failure to state a claim will be precluded from bringing any
16 other civil action or appeal *in forma pauperis* "unless the prisoner is under
17 imminent danger of serious physical injury." 28 U.S.C. § 1915(g). **Plaintiff**
18 **is advised to read the statutory provisions under 28 U.S.C. § 1915. This**
19 **dismissal of Plaintiff's complaint may count as one of the three**

1 **dismissals allowed by 28 U.S.C. § 1915(g) and may adversely affect his**
2 **ability to file future claims.**

3 **IT IS SO ORDERED.** The District Court Executive is directed to enter this
4 Order, enter judgment, forward copies to Plaintiff at his last known address, and
5 close the file. The District Court Executive is further directed to forward a copy of
6 this Order to the Office of the Attorney General of Washington, Criminal Justice
7 Division. The Court certifies any appeal of this dismissal would not be taken in
8 good faith.

9 **DATED** this 3rd day of February 2016.

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13 SALVADOR MENDEZA, JR.
14 United States District Judge
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